

*Before the*  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	

**COMMENTS OF THE UNITED STATES CONFERENCE OF CATHOLIC  
BISHOPS, ALLIANCE FOR COMMUNITY MEDIA, APPALACHIAN  
PEOPLE’S ACTION COALITION, CENTER FOR DIGITAL DEMOCRACY,  
CONSUMER ACTION, EDMONT NEIGHBORHOOD COALITION AND  
MIGRANT LEGAL ACTION PROGRAM**

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## SUMMARY

USCCB, *et al.*, argue that all providers of voice over Internet protocol (“VoIP”) services that are the functional equivalent of traditional telephone services must make an equitable contribution to the Universal Service Fund (“USF”). Unless the Commission takes steps to ensure that VoIP providers pay into the USF, the migration of large users to cost-efficient VoIP will increasingly siphon funds away from the USF and leave those who can least afford it with the burden of supporting the fund. This would jeopardize the Communications Act’s goal of ensuring ubiquitous nationwide telephone service, hurt low-income and rural customers, undermine the successful E-rate program for schools and libraries, and make it impossible for the USF to expand its support in the future.

USCCB, *et al.* urge the Commission to utilize a “functional” approach to categorizing IP-enable services. Under this approach, the Commission should consider (1) whether the service provides instantaneous, real-time communication; (2) whether consumers place and receive calls using regular telephone numbers; (3) whether the consumer may place calls and receive calls from everyone else with telephone service, e.g., the service interconnects with the PSTN; (4) whether the service is offered to the general public; and (5) whether the service is offered for a fee. VoIP services meeting these criteria would be deemed “functionally equivalent.”

All providers of “functionally equivalent” VoIP services should be required to make equitable contributions to the USF. The Commission clearly possesses statutory authority to require providers of functionally equivalent VoIP services to make an equitable contribution to supporting its universal service policies. However, the source of that authority varies. Where the VoIP provider is a telephone or cable company offering

the service over its own transmission facilities, it meets the statutory definition of “telecommunications carrier” and thus is required by section 254(d) to support universal service. If the Commission determines that imposing the full panoply of Title II regulations on telecommunications services is not necessary, it has the authority to forbear from requiring certain requirements under section 160 of the 1996 Act.

For providers of functionally-equivalent VoIP services that do not fall within the definition of “telecommunications carriers,” the FCC should assert its Title I ancillary jurisdiction to require them to contribute to the USF. The Commission has this authority since functionally equivalent VoIP services are interstate communications by wire or radio and the FCC could not fulfill its statutory duty to maintain and preserve universal service without these telephone providers contributing equitably.

Finally, USCCB, *et al.* urge the Commission to reform the method of assessing contributions to the USF. Specifically, we urge the Commission to adopt a universal service contribution methodology based on *all* telecommunications revenue since VoIP makes intrastate and interstate distinctions irrelevant. Not only does the Commission have the jurisdiction to institute such an all-revenue mechanism, but it will be easier to administer, greatly expand the pool of contributors, and ensure equitable contributions from all telephony providers.

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**COMMENTS OF USCCB, *et al.***

The United States Conference of Catholic Bishops (“USCCB”), Alliance for Community Media, Appalachian People’s Action Coalition, Center for Digital Democracy, Consumer Action, Edgemont Neighborhood Coalition and the Migrant Legal Action Program (“USCCB, *et al.*”),<sup>1</sup> through their attorneys, the Institute for Public Representation (“IPR”), submit comments in response to the *IP-Enabled Services Notice of Proposed Rulemaking*<sup>2</sup> requesting comments on what the Commission’s role should be in regulating emerging IP-enabled services, such as Voice over Internet Protocol (“VoIP”).

These comments are limited to the issues of how such services should be classified under the Communications Act and how the regulatory classification affects the Commission’s ability to fund universal service.<sup>3</sup> We show that universal service will be undermined unless the providers of VoIP services that are functionally equivalent to

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<sup>1</sup> USCCB, *et al.* are religious and non-profit organizations that advocate for the interests of low-income individuals and families.

<sup>2</sup> *IP-Enabled Services, Notice of Proposed Rulemaking*, WC Docket No. 04-36, FCC 04-28 (rel. March 10, 2004)(“*Notice*”).

<sup>3</sup> USCCB, *et al.* also note, however, that the arguments raised in support of VoIP providers contributing to universal service mechanisms also apply to funding the Telecommunications Relay Services fund. Furthermore, VoIP providers that are the functional equivalent to traditional telephone service should be accessible to persons with disabilities.

traditional telephone service are required to make equitable contributions to the Universal Service Fund (“USF”). We further demonstrate that the Commission had statutory authority to require such contributions. Thus, USCCB, *et al.* strongly urge the Commission to require VoIP services that provide the functional equivalent of telephone service to support universal service.

**I. UNIVERSAL SERVICE IS AN ESSENTIAL PROGRAM THAT COULD BE UNDERMINED UNLESS VOIP PROVIDERS MAKE AN EQUITABLE CONTRIBUTION**

In the Telecommunications Act of 1996, Congress explicitly established the principle that all consumers, including the low-income and those in rural and high cost areas, should have access to telecommunications and information services. The *Notice* asks how the regulatory classification of VoIP will impact the current universal service support mechanisms.<sup>4</sup> While VoIP may benefit consumers because it has the potential to be more efficient and cost-effective than traditional circuit-switched networks,<sup>5</sup> it also has the potential to threaten the goal of ubiquitous nationwide access to telecommunications and information services by limiting the amount of funds that sustain the USF. Likewise, the successful E-Rate program, which offers schools and libraries in low-income areas a subsidized educational rate for advanced telecommunications services, also may be harmed unless the Commission takes steps to make sure VoIP providers contribute fairly to the USF.

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<sup>4</sup> *Notice* at ¶ 65.

<sup>5</sup> *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97, at ¶ 3 (rel. April 21, 2004) (“AT&T Order”); Rebecca Buckman, *SingTel Venture with U.S. Firm will Offer Web-Phone Service*, Wall St. J., April 5, 2004, at B4; Wiley Rein & Fielding LLP, *VoIP at the Crossroads*, *Ex Parte* Presentation, p. 2, WC Docket Nos. 04-28, 03-

**A. Universal Service is Essential in Increasing and Maintaining Telephone Subscribership and in Promoting Technology Education and Access**

The goal of universal access to telephone service dates back to the 1934 Communications Act. The FCC was charged by Congress to “regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”<sup>6</sup> Today the telephone penetration rate is near 95 percent,<sup>7</sup> a number that is largely credited to the success of universal service program.

The universal service program promotes access to telephone service for low-income and rural/high-cost consumers and subsidizes advanced telecommunications and equipment for educational purposes.<sup>8</sup> It also has the potential to further the deployment of advanced services to consumers. Each of these four aspects of universal service is dependent upon the continued viability of the USF.<sup>9</sup>

**Low Income Support:** Universal Service is essential in increasing and maintaining telephone subscribership among low-income consumers in the U.S. The primary means by which the FCC ensures that low-income consumers have access to

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266, 04-29, 03-211, 02-361; CC Docket Nos. 96-45, 96-198, 01-92, 94-102; IB Docket Nos. 02-324, 96261 (Feb. 25, 2004) (“*VoIP at the Crossroads*”).

<sup>6</sup> 47 U.S.C. § 151.

<sup>7</sup> Industry Analysis Division, Wireline Competition Bureau, FCC, *Telephone Subscribership in the United States* at 1 (rel. May 2004), available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/subs1103.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/subs1103.pdf) (“*2004 Subscribership Report*”).

<sup>8</sup> It also provides subsidies for rural health care providers. 47 U.S.C. § 254(h).

<sup>9</sup> The same arguments that apply to funds by siphoned from the USF also apply to Telecommunications Relay Services (“TRS”) fund. This fund, required under Title IV of the ADA, requires common carriers that provide interstate services to contribute. Unless



basic telecommunications services is through the Lifeline program, which subsidizes local telephone service, and the Link-Up program, which subsidizes telephone hook-ups. The Lifeline and Link-Up programs (collectively, “Lifeline”) have proven to be effective in increasing and maintaining telephone subscribership among low-income consumers in the U.S.

The Commission recently recognized and affirmed the importance of its low-income support program by expanding the eligibility criteria for participation in the Lifeline program.<sup>10</sup> It noted that the Lifeline program furthered the goal that consumers in all regions of the Nation, including low-income residents, should have access to telecommunications and information services.<sup>11</sup>

The Federal-State Joint Board on Universal Service found a strong connection between Lifeline assistance and telephone penetration. It noted that between 1984 and 1997, the telephone penetration rate for low-income households in states with Lifeline assistance increased by an average of 0.5 percent per year while states without Lifeline assistance increased by an average of 0.25 percent per year.<sup>12</sup> The Federal-State Joint Board's *1999 Monitoring Report* found that "the Lifeline program has a positive and significant impact on telephone subscribership."<sup>13</sup> In fact, since the FCC first established

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VoIP service providers contribute to the TRS fund, support for vital relay services will be eroded over time.

<sup>10</sup> *FCC, Lifeline and Link-Up*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 03-109, FCC 04-87 (rel. April 29, 2004) (“*Lifeline Eligibility Order*”).

<sup>11</sup> *Lifeline Eligibility Order* at ¶¶ 3-4.

<sup>12</sup> *Federal-State Joint Board on Universal Service, Lifeline and Link-Up*, Recommended Decision, 18 FCC Rcd 6589, 6593 (2003).

<sup>13</sup> Industry Analysis Division, Common Carrier Bureau, FCC, *Federal-State Joint Board December 1999 Monitoring Report* at 6 - 7 (rel. Feb. 2000), available at

Lifeline to help low-income households afford the monthly cost of telephone service in 1985, penetration rates among the lowest income households have grown steadily from 80 to 89.2 percent.<sup>14</sup>

Despite Lifeline's success, telephone subscribership among low-income consumers and minorities still lags behind the rest of the population. The average telephone penetration rate in the U.S. has risen to 94.7 percent, but only 79.4 percent for households with incomes below \$5,000.<sup>15</sup> While the FCC points out that VoIP will reduce the cost of communication for consumers,<sup>16</sup> this is only true for consumers who already have access to cable or broadband service. Indeed, many VoIP plans require that the customer own a computer. For instance, Cablevision offers unlimited, local and long distance VoIP calls for \$34.95 a month.<sup>17</sup> It is only available, however, to those who subscribe to Cablevision's Optimum Online service<sup>18</sup> which costs around \$45 to \$50, depending on whether subscribers also get Cablevision cable.<sup>19</sup> Vonage, another VoIP provider, requires that subscribers have a computer and a broadband connection. While

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[http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/Monitor/mrj99-6.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Monitor/mrj99-6.pdf).

<sup>14</sup> Wireline Competition Bureau, FCC, *FCC Releases Supplemental Telephone Penetration Report* at 1 (rel. February 2004) available at

[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-244346A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244346A1.pdf).

<sup>15</sup> 2004 *Telephone Subscribership Report* at 1. Telephone subscribership is lower among blacks (89.7 percent) and Hispanics (90.5 percent) compared to whites (95.5 percent). *Id.*

<sup>16</sup> *Notice* at ¶ 5.

<sup>17</sup> Cablevision website, [http://optimumvoice.com/index.jhtml?pageType=what\\_is\\_it](http://optimumvoice.com/index.jhtml?pageType=what_is_it).

<sup>18</sup> *Id.*

<sup>19</sup> Cablevision website,

<http://www.optimumonline.com/index.jhtml;jsessionid=VAMP25TJMLNNYCQLASDSF3QKBMCIMI5G?pageType=pricing>.

Vonage's unlimited calling plan costs \$29.99,<sup>20</sup> the service requires a broadband connection and a computer.

Overall, low-income consumers and minorities are less likely to have the broadband-equipped computer that VoIP plans require. In 2002, the Commerce Department found that 85.4 percent of households earning \$75,000 and above had Internet access (either dial-up or broadband) compared to 20.5 percent of households earning less than \$15,000 per year.<sup>21</sup> Even fewer low-income consumers have the high-speed Internet connection required by most VoIP services.<sup>22</sup> This same Internet access problem applies to minorities. While 55.4 percent of white households have Internet access, the same is true for only 30.8 percent of black and 32 percent of Hispanic households.<sup>23</sup> Thus, many low-income and minority consumers who would benefit from lower cost telephone service lack the prerequisite Internet access.

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<sup>20</sup> Scott Sleek, *Vonage Grows Subs, Cuts Prices*, VoIP Monitor Headlines, available at [http://www.voip-monitor.com/subscribers/index.htm?article\\_id=4915](http://www.voip-monitor.com/subscribers/index.htm?article_id=4915).

<sup>21</sup> U.S. Dep't of Commerce, Econ. and Statistics Admin., Nat'l Telecomm. and Info. Admin., Chart H7, *Percent of U.S. Households with Internet Access, By Internet Access, By Income, By U.S., Rural, Urban, and Central Cities, 2001*, available at <http://www.ntia.doc.gov/ntiahome/dn/hhs/ChartH7.htm>.

<sup>22</sup> Of those with Internet access and incomes less than \$15,000, 16.7 percent had a high-speed Internet connection (compared with 25.1 percent of consumers with incomes more than \$75,000). *Id.* at Chart H12, *Percent of U.S. Households with Internet Access, By Speed, By Income, 2001*, available at <http://www.ntia.doc.gov/ntiahome/dn/hhs/ChartH12.htm>. High median household income also has a positive association with high-speed subscribers. In the top one-tenth of zip codes ranked by median household income, high-speed subscribers are reported in 98 percent of zip codes. By contrast, high-speed subscribers are reported in 78 percent of zip codes with the lowest median household income. Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, *High Speed Services for Internet Access: Status as of June 30, 2003* at 5 (rel. December 2003) available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/hspd1203.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1203.pdf) ("2003 High Speed Services Report").

<sup>23</sup> U.S. Dep't of Commerce, Econ. and Statistics Admin., Nat'l Telecomm. and Info. Admin., Chart H8, *Percent of U.S. Households with Internet Access, By Race/Hispanic*

The problem is exacerbated since the Lifeline program probably cannot be used to subsidize VoIP telephone service for those who are eligible for low-income support. Only eligible telecommunications carriers can take part in the Lifeline program. To be an eligible telecommunications carrier, a VoIP provider must not only be classified as a telecommunications carrier but must provide all the core services supported by the universal services fund.<sup>24</sup> This means that low-income consumers, minorities and seniors are less able to take advantage of this new technology and its capabilities.

**Support for Rural Areas:** Congress directed the Commission and the states to devise methods to ensure that consumers in “rural, insular, and high cost areas” have access to telecommunications and information services at rates that are reasonably comparable to similar services in urban areas.<sup>25</sup> The high-cost support mechanisms enable areas with very high costs to recover some of this expense from the federal universal service support mechanisms, leaving a smaller amount to be recovered through consumer rates or state universal service support mechanisms.<sup>26</sup>

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*Origin, By U.S., Rural, Urban, and Central Cities, 2001*, available at <http://www.ntia.doc.gov/ntiahome/dn/hhs/ChartH8.htm>.

<sup>24</sup> See *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8826 (1997) (“1997 Universal Service Order”). “[C]arriers designated as eligible telecommunications providers should be required to offer all of the services designated for universal service support.” These services are single-party service; voice grade access to the public switched network; DTMF signaling or its functional equivalent; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll limitation services for qualifying low-income consumers. *Id.* at 8790. As discussed *infra* at Part III.B., only some VoIP providers may be classified as telecommunications carriers, and even they may not offer all of the necessary services to be an ETC.

<sup>25</sup> 47 U.S.C. § 254(b)(3).

<sup>26</sup> *Federal-State Joint Board on Universal Service, 2003 Universal Service Monitoring Report*, CC Docket No. 98-202 at 3 - 1 (rel. December 2003), available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/Monitor/mr03-0.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Monitor/mr03-0.pdf).

Various types of subsidies are given to high-cost carriers receive to offset their common line costs, higher switching costs, and many other types of costs associated with high-cost areas.<sup>27</sup> Without the necessary funding from VoIP providers, service to rural areas would be jeopardized. Currently, more than half of all universal service funds, 58 percent, go to support service in rural areas.<sup>28</sup> In 2003, more than \$3 billion went to subsidize high-cost support.<sup>29</sup>

Not only are many rural consumers dependent on the USF for assistance, they are less likely to be able to take advantage of VoIP because in many cases broadband service is not available in their area. As of June 2003, high-speed Internet subscribers were present in 99 percent of the most densely populated zip codes, while high-speed subscribers were present in only 69 percent of sparsely populated zip codes.<sup>30</sup>

**Schools and Libraries:** The 1996 Act also provides subsidies for advanced telecommunications services for qualified schools and libraries under the E-Rate program. The schools and libraries support mechanism enables schools and libraries to obtain eligible services at discounted rates, receiving telecommunications services, Internet access, and internal connections at discounts that range from 20 percent to 90 percent. The level of the discount is generally based on the percentage of students eligible for the national school lunch program, or in the case of libraries, the percentage of students eligible for the national school lunch program in the school district where the

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<sup>27</sup> Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, *2004 Trends in Telephone Service*, at 19 - 1, 2 (rel. May 2004) available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/trend504.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend504.pdf) (“*2004 Trends in Telephone Service*”).

<sup>28</sup> *Id.* at 19 - 5.

<sup>29</sup> *Id.*

<sup>30</sup> *2003 High Speed Services Report* at 4.

library is located. In addition, schools and libraries located in rural areas receive an additional discount.<sup>31</sup>

The E-Rate program has awarded billions of dollars worth of discounts on telecommunications services and equipment to schools and libraries. An examination of the E-Rate program conducted in 2000 found that 36,000 applications were filed for E-Rate funding in that year alone, nearly 60 percent of those came from the country's neediest schools and libraries.<sup>32</sup> Since 1998, more than \$7.5 billion has been invested in the program.<sup>33</sup>

A study of four urban school districts found that network infrastructure deployment has accelerated and Internet access has significantly expanded thanks to the E-Rate program.<sup>34</sup> These advances in providing technology to children, especially those in low-income areas, would be jeopardized if VoIP users do not fairly contribute to the USF.

**Potential for Advanced Services:** The Commission recently determined that advanced and high-speed services should not be included within the list of core services.<sup>35</sup> However, the USF could be used to spur broadband deployment in the future as high speed services become more affordable and are subscribed to by a substantial

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<sup>31</sup> 2004 *Trends in Telephone Service* at 19 - 4.

<sup>32</sup> Benton Foundation, Press Release on “The E-Rate in America: A Tale of Four Cities,” available at <http://www.benton.org/publibrary/e-rate/pressrelease.html>, March 2, 2000 (“*The E-Rate in America*”).

<sup>33</sup> 2004 *Trends in Telephone Service* at 19 - 14.

<sup>34</sup> The study looked at school districts in Chicago, Cleveland, Detroit and Milwaukee. *The E-Rate in America*.

<sup>35</sup> *Federal-State Joint Board on Universal Service*, Recommended Decision, 17 FCC Rcd 14,095, 14,099 (2002). Commissioner Adelstein said that if VoIP becomes the industry standard, there is an argument that advanced services should be supported by universal service. Edie Herman, *Wireline*, Communications Daily (May 21, 2004).

majority of residential consumers.<sup>36</sup> Commissioner Copps said that advanced services should be considered essential for educational, public health or public safety purposes and added to the list of supported services, noting that “advanced services become more and more essential with each passing day.”<sup>37</sup>

The paradox of burgeoning VoIP technologies is that it has the potential to siphon universal service support from the very high-speed broadband platform Internet telephony requires to operate. If VoIP does not contribute to the USF, the funds to support broadband in rural areas and to low-income Americans will never become available, thus, preventing them from gaining access to VoIP services.

#### **B. Universal Service Funding Policy Needs to Keep Pace with Burgeoning VoIP Technology**

The *Notice* inquires about the migration to IP-enabled services and how this affects the Commission’s statutory obligation to support and advance universal service.<sup>38</sup> Although USCCB, *et al.* cannot predict precisely the impact that VoIP will have on the USF, we are concerned that unless the Commission require VoIP providers to contribute

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<sup>36</sup> Section 254(c) states that when choosing this list of telecommunications services, the Joint Board and Commission “shall consider” whether the service is (1) essential to education, public health, or public safety; (2) subscribed to by a substantial majority of residential consumers; (3) being deployed by telecommunications carriers in public telecommunications networks; and (4) consistent with the public interest, convenience and necessity. The Commission and Joint Board have concluded that each of these criteria must be considered, “but not each necessarily met, before a service may be included within the general definition of universal service, should it be in the public interest.”

<sup>37</sup> *FCC, Federal-State Joint Board on Universal Service*, Order and Order on Reconsideration, 18 FCC Rcd 15,090, 15,114 (2003) (separate statement of Commissioner Michael J. Copps, approving in part, concurring in part) (“*Definition of Universal Service Order*”). Commissioners Adelstein and Abernathy also noted the importance of advanced services and the possibility that it may someday be included in the list of core services when subscribership is higher. *Id.* at 15,113 (separate statement of Commissioners Kathleen Q. Abernathy and Jonathon S. Adelstein).

their fair share, the USF will be reduced to the point that the Commission will no longer be able to meet its statutory obligation to support and advance universal service.

The USF is currently funded based on a percentage of revenues for interstate calling. If the Commission were to conclude that VoIP service providers are not “telecommunications carriers,”<sup>39</sup> and thus, required to contribute to the USF by section 254, funding for universal service will decline as more businesses and consumers begin using VoIP as their primary telephone service.

VoIP services are already growing rapidly. It is estimated that there will be more than 5 million Internet telephony subscribers by 2007.<sup>40</sup> Businesses customers, which provide more than half of USF revenue,<sup>41</sup> are most likely to migrate to VoIP. Cable operators are competing aggressively with phone companies to capture large business customers.<sup>42</sup> Already Cox Communications Inc. is supplying telecommunications services to several business customers, including MGM Mirage resorts and Chesapeake Energy Corp. Time Warner Cable has signed on such companies as L.L. Bean and Fairchild Semiconductor International.<sup>43</sup> Industry analysts are noting the growing marketing and use of VoIP services. Standard & Poor's recently put Verizon Communications Inc.'s long-term credit ratings on review for a possible downgrade,

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<sup>38</sup> Notice at ¶ 66.

<sup>39</sup> The FCC has recently found that AT&T's phone-to-phone IP telephony was a telecommunications service. This declaratory ruling, however, applied narrowly to one of AT&T's VoIP services. *AT&T Order* at ¶ 4.

<sup>40</sup> *Covad Commits to Acquisition of GoBeam, Accelerates VoIP Launch*, Telecomweb News Digest, March 8, 2004.

<sup>41</sup> *Commission Seeks Comment on Staff Study Regarding Alternative Contribution Methodologies*, 18 FCC Rcd 3006, 3010 (2003) (“*Staff Study*”).

<sup>42</sup> Ellen Sheng of Dow Jones Newswires, *Cable-Baby Bell Competition Heats Up in Business Services*, Wall St. J. Online, March 30, 2004.

<sup>43</sup> *Id.*



finding that cable companies' offering phone service poses a "substantial" threat to Verizon's business.<sup>44</sup>

Many residential consumers are also benefiting from more cost-effective VoIP services and many more can be expected to do so in the near future. Most U.S. homes passed by cable will have access to a VoIP service by 2006.<sup>45</sup> It is projected that consumer and small business VoIP subscribers will provide \$5.7 billion in annual services revenue in 2008.<sup>46</sup> By 2013, it is estimated that VoIP services could replace 20 percent of local phone lines,<sup>47</sup> which would likely result in a reduction of more than 20 percent in contributions to USF since customers who frequently make long distance calls are more likely to switch to VoIP. Unless VoIP services are required to contribute their fair share to the USF, there will be insufficient funds to maintain current levels of universal service, much less expand it to support broadband and other services.<sup>48</sup>

Thus, the Commission should ensure that providers of VoIP contribute their fair share to the USF to keep the fund viable. Under the Telecommunications Act, the Commission has the authority to mandate that VoIP classified as telecommunications contribute to the fund. For other VoIP services classified as information services that are the functional equivalent of telephone service, the FCC should assert its ancillary

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<sup>44</sup> Nick Baker & Mara Lemos of Dow Jones Newswires, *S&P: CableTelphony Significant New Threat to Phone Cos*, Wall St. J. Online, March 26, 2004.

<sup>45</sup> John M. Higgins, *Cable Will Eat the Phone Companies Lunch . . . and 7 Other Ways the Industry Will Change*, Broad. & Cable, May 3, 2004, at 1, 18-19.

<sup>46</sup> *VoIP Fragmenting U.S. Telecoms Market*, Global News Wire—Europe Intelligence Wire, April 23, 2004.

<sup>47</sup> Justin Hyde, *Telecoms Struggle with Impact of Internet Calls*, Reuters, April 15, 2004.

<sup>48</sup> *Staff Study* at 3010. It shows the projected contribution base dropping from \$80 billion in 2004 to \$76 billion in 2007, while program requirements are increasing from \$6.6 billion to \$7.4 billion over the same span.

jurisdiction since requiring these services to contribute equitably is the only way to ensure the continued vitality of the USF.

## **II. THE FCC SHOULD CATEGORIZE IP-ENABLED SERVICES USING A FUNCTIONAL APPROACH**

The *Notice* seeks comment on how IP-enabled services should be categorized, and suggests a number of approaches, including functional equivalence to traditional telephone service.<sup>49</sup> USCCB, *et al.* generally support categorizing IP-enabled services based on functionality rather than the technology or facilities used to provide it to consumers. A functional approach is consistent with consumer expectations, treats providers of similar services in a competitively neutral manner, and is supported by past precedent.

To determine whether a VoIP service is functionally equivalent to traditional telephone service, the Commission should consider how consumers view the service. Relevant factors include: (1) whether the service provides instantaneous, real-time communication; (2) whether consumers place and receive calls using regular telephone numbers; (3) whether the consumer may place calls and receive calls from everyone else with telephone service, e.g., the service interconnects with the public switched telephone network (PSTN); (4) whether the service is offered to the general public; and (5) whether the service is offered for a fee. If a VoIP service meets all of these criteria, it should be considered functionally equivalent to traditional telephone service, even if it also

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<sup>49</sup> *Notice* at ¶¶ 35-37.

provides additional functionality that is not necessarily provided by traditional telephone carriers.<sup>50</sup>

The first three factors are features that consumers expect from traditional telephone service. The fourth and fifth characteristics, *i.e.*, that the VoIP services are offered to the general public and are offered for a fee, are similar to the criteria used to determine whether a service is a common carrier service.<sup>51</sup> The key element is that a common carrier does not make individualized decisions about whether and on what terms to serve particular users.<sup>52</sup>

It is clear that some VoIP providers offer their services to the public indiscriminately.<sup>53</sup> The fact that the service may in some cases only be used by

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<sup>50</sup> For instance, the Commission notes that VoIP providers are working with software developers to enhance telephone service, possibly providing instant messaging, e-mail, web surfing, conferencing, and other features. *Notice* at ¶¶ 16-17. While this enhanced functionality may attract and benefit users, the underlying service, however, remains traditional telephony.

<sup>51</sup> In *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976), the court set forth a two-step test for common carriage: 1) is there any legal compulsion to serve the public indifferently, and if not, 2) are there reasons implicit in the nature of operations to expect an indifferent holding out to the eligible user public. The Commission has interpreted this test to mean that a carrier should be regulated as a common carrier if it will “make capacity available to the public indifferently or if the public interest requires common carrier operation of the proposed facility.” *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 924 (D.C. Cir. 1999). The Commission understood “available to the public” to mean “offered without restriction on who may receive it.” *Id.* at 923.

<sup>52</sup> *1997 Universal Service Order*, 12 FCC Rcd at 9178.

<sup>53</sup> For instance, AT&T’s Petition to the FCC describes its service where customer calls are routed from the PSTN to an IP Internet backbone through one of its local IP gateways. *Petition for Declaratory Ruling that AT&T’s phone-to-phone IP telephony Services are Exempt from Access Charges*, FCC 04-97, WC 02-361, at 17-18, filed Oct. 18, 2002. (“AT&T Petition”). Time Warner Cable also offers a service called Digital Phone, allowing customers to make VoIP calls using their regular phones. Heather Hollingsworth, *Time Warner links with MCI, Sprint for voice over Internet calls*, Associated Press, <http://www.detnews.com/2003/technology/0312.09/technology-346083.htm>, Dec. 9, 2003.

customers that have broadband access does not mean service is withheld based on individualized decisions. Any member of the public may receive service so long as they subscribe to broadband.

Using a functional approach is not only consistent with consumer expectations, but would be consistent with the Commission's policy of competitive neutrality. The principle of competitive neutrality is reflected in multiple provisions of section 254.<sup>54</sup> Moreover, the Commission explicitly adopted the concept of competitive neutrality in its *1997 Universal Service Order*.<sup>55</sup> Because functionally equivalent VoIP providers directly compete with traditional telecommunications carriers, they should be subject to the same regulatory treatment. Moreover, given rapid changes in technology, designating regulatory treatment based on the specific technology and facilities would be unnecessarily complex and administratively burdensome.

A functional approach is also consistent with Commission precedents. In the *Stevens Report*, the Commission stated that in classifying services it does not "depend on the types of facilities used . . . [but] rather on the nature of the service being offered to customers."<sup>56</sup> It further found that certain "phone-to-phone" VoIP services resemble telecommunications because they are (1) held out as voice telephony, (2) do not require

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<sup>54</sup> 47 U.S.C. § 254 (b)(4) (requiring "equitable and nondiscriminatory" contributions to the preservation and advancement of universal service by all providers of telecommunications services); (b)(5) (preservation and advancement of universal service); (d) (same requirements for telecommunications carriers); (f) (requiring every telecommunications carrier that provides intrastate telecommunications services to contribute in an equitable and nondiscriminatory basis to preserve and advance universal service in the State); (h)(2) (requiring the Commission to establish competitively neutral rules to enhance access to advanced telecommunications and information services for public schools, health care providers and libraries).

<sup>55</sup> *1997 Universal Service Order*, 12 FCC Rcd at 8803.

special telephone equipment to place an ordinary call, (3) allow customers to call ordinary phone numbers and (4) transmit information without net change in form or content.<sup>57</sup> In the *Cable Modem Order*, the FCC likewise used the functional approach in determining whether a service was an information or telecommunications service, noting that the classification of a service rests on “the functions that cable modem service makes available to its end users.”<sup>58</sup> Thus, the FCC should adopt a functional approach in classifying IP-enabled services.<sup>59</sup>

### **III. FUNCTIONALLY EQUIVALENT VOIP PROVIDERS SHOULD BE SUBJECT TO UNIVERSAL SERVICE OBLIGATIONS**

All providers of VoIP services that are functionally equivalent to traditional telephone service should be required to make an equitable contribution in support of universal service. To treat functionally equivalent VoIP services differently would give those competitors artificial advantages in the marketplace, provide incentives for competitors to base decisions on regulatory avoidance rather than other business factors, and encourage consumer migration from traditional, regulated telephone service, thereby reducing funding for universal service. Moreover, it is appropriate that functionally equivalent VoIP providers and their customers should contribute to universal service

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<sup>56</sup> *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11,501, 11,530 (1998) (“*Stevens Report*”).

<sup>57</sup> *Steven Report*, 13 FCC Rcd at 11,543-44.

<sup>58</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, 17 FCC Rcd 4798, 4821 (2002) (“*Cable Modem Order*”), *aff’d in part, vacated in part sub nom.* Brand X Internet Services v. FCC, 345 F.3d 1120, (9th Cir. 2003), *rehearing en banc denied to allow cert. review*, No. 02-70518, 2004 U.S. App. LEXIS 8023 (9th Cir. March 31, 2004).

<sup>59</sup> While these comments focus on section 254 and the preservation of the USF, the functional approach described by USCCB, *et al.* applies equally to section 255 and

because they benefit from access to the PTSN and from the ability to place and receive call from others.

The Commission clearly possesses statutory authority to require providers of functionally equivalent VoIP services to make an equitable contribution to supporting its universal service policies. However, the source of that authority varies depending upon whether the VoIP provider is providing the service over its own transmission facilities or whether the customer must utilize the service in conjunction with broadband service provided by someone else. In the first case, as will be explained below, the VoIP services meet the statutory definition of “telecommunications services” and thus, providers of these services are required by section 254(d) to support universal service. In the second case, the Commission should use its ancillary jurisdiction under section 152 to compel universal service contributions from these providers.

**A. Providers of VoIP Services Offered Over Their Own Transmission Facilities are Telecommunications Carriers Required by Section 254(d) to Contribute to the USF**

Section 254(d) requires that “Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.”<sup>60</sup> As demonstrated below, telephone and cable companies that provide functionally equivalent VoIP services over their own transmission services are telecommunications carriers that provide interstate telecommunications. Examples of such service might include AT&T’s

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ensuring that persons with disabilities have access to VoIP services that are the functional equivalent to traditional telephone service.

CallVantage, BellSouth's Centrex IP, Qwest and Verizon's VoIP services, Time Warner Cable's Digital Phone, Cox Cable's Digital Telephone service, and Cablevision's Optimum Voice.

**1. Telephone and cable companies that offer functionally equivalent telephone service are telecommunications carriers as defined by the Communications Act**

Telephone companies that provide functionally equivalent VoIP service, such as AT&T, Verizon, and SBC, are in fact already classified as telecommunications carriers. But cable companies, that offer functionally equivalent VoIP services via their transmission facilities, also meet the statutory definition of "telecommunications carriers."

The Communications Act defines "telecommunications carrier" generally to mean "any provider of telecommunications services."<sup>61</sup> The Act defines "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of facilities used."<sup>62</sup> It defines "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received."<sup>63</sup> Telephone and cable companies offering functionally equivalent VoIP provide telecommunications services as defined by the Communications Act.

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<sup>60</sup> 47 U.S.C. § 254(d).

<sup>61</sup> 47 U.S.C. §153(44).

<sup>62</sup> 47 U.S.C. § 153(46).

<sup>63</sup> 47 U.S.C. § 153(43).

**Telecommunications.** Telephone or cable companies offering functionally-equivalent VoIP services over their own transmission facilities meet each part of the statutory definition of telecommunications.

First, they offer transmission. In the *Pulver Declaratory Ruling*, the Commission found that Pulver’s Free World Dial-up (FWD) offering was not telecommunications because Pulver did not provide provides transmission to its members; rather, members had to provide their own broadband transmission to interact with the FWD server.<sup>64</sup> In contrast, VoIP companies that also provide the underlying broadband connection do provide transmission to their customers.

Second, telephone and cable VoIP providers transmit information of the user’s choosing between or among points specified by the users. The VoIP provider selects neither the content of communication nor the beginning or end points of the communication.

Third, from a functional or consumer point of view, telephone and cable VoIP providers transmit information without change in form or content. Just because telephone calls using VoIP are converted from an Internet-based transmission to a voice signal that can be heard over a traditional analog phone does not preclude classifying VoIP as a telecommunications service. The Commission noted in the *Stevens Report* that “certain

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<sup>64</sup> *Petition for Declaratory Ruling that pulver.com’s Free World Dial-up is Neither Telecommunications nor a Telecommunications Service, Memorandum Opinion and Order*, WC Docket No. 03-45, FCC 04-27 at ¶ 9 (rel. Feb. 19, 2004) (“*Pulver Declaratory Ruling*”).



protocol processing services that result in no net protocol conversion to the end user are classified as basic services; those services are deemed telecommunications services.”<sup>65</sup>

In the *Non-Accounting Safeguards Order*, the Commission identified three categories of protocol processing services that it treats as basic, or telecommunications services, rather than enhanced, or information services, “because they result in no net protocol conversion to the end user.”<sup>66</sup> These categories include

protocol processing: ... 2) in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and 3) involving internetworking (conversions taking place solely within the carrier’s network to facilitate provision of a basic network service that result in no net conversion to the end user).<sup>67</sup>

Protocol processing done in connection with VoIP may fit under one or both of these categories. To the extent that functionally equivalent VoIP providers change the form of the information to allow VoIP customers to communicate with non-VoIP customers, it likely falls within category two. As the Commission found in the *Protocols Order*, analog to digital conversions (or vice versa) used to interconnect equipment with the network do not constitute an enhanced, or information service.<sup>68</sup> To conclude otherwise, the Commission explained, could create disincentives for the introduction of new technology.<sup>69</sup>

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<sup>65</sup> *Stevens Report*, 13 FCC Rcd at 11,526 (citing *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21,905, 21,958 (1996) (“*Non-Accounting Safeguards Order*”)).

<sup>66</sup> *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21,957-58.

<sup>67</sup> *Computer III Phase II Order*, 2 FCC Rcd at 3081-82; *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21,957-58.

<sup>68</sup> *Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, Memorandum Opinion, Order, and Statement of Principles, 95 FCC 2d 584, 591-92 (1983) (“*Protocols Order*”).

<sup>69</sup> *Id.* at 592.

VoIP may also fall within the third category, i.e., internetworking. Indeed, the Commission has already determined that the protocol conversions associated with AT&T's phone-to-phone VoIP falls within this category, and thus constitutes a telecommunications service.<sup>70</sup>

In sum, telephone or cable companies offering functionally-equivalent VoIP services over their own transmission facilities are providing "telecommunications" as defined by the Communications Act.

**Telecommunications Service.** Because functionally-equivalent VoIP services are "telecommunications," it is clear that they are also "telecommunications services." The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of facilities used."<sup>71</sup> Under the proposed criteria for functional equivalency, *see supra* Part II, VoIP must be offered to the general public for a fee. Thus, by definition, providers of functionally-equivalent VoIP services are providers of telecommunications services, and hence, are "telecommunications carriers."

## **2. Telephone and cable companies that offer functionally equivalent VoIP service are providing interstate telecommunications services**

As just discussed, telephone and cable companies that offer functionally equivalent telephone service are providing telecommunications services. Nor can there be any question that these services are interstate in nature. Indeed, the Commission

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<sup>70</sup> *AT&T Order* at ¶ 12. AT&T's phone-to-phone VoIP service converts voice traffic from its existing format into an IP format, transports it over AT&T's Internet backbone, converts the call back and delivers it through a local exchange carrier. Thus, it undergoes no net protocol conversion. *Id.* at ¶ 1.

already determined that Pulver's FWD is an interstate service.<sup>72</sup> Like FWD, functionally-equivalent VoIP services cannot be characterized as purely intrastate. Even calls completed within a state's borders may not be purely intrastate transmissions because local calls may travel across interstate lines while traveling through the IP network. Thus, it is difficult if not impossible to determine the transmission path of calls made via the Internet. By nature, these services are "Internet application[s] not bound by geography."<sup>73</sup> In *Pulver*, the Commission held, "Where separating interstate traffic from intrastate traffic is impossible or impractical ... such traffic [is] interstate in nature."<sup>74</sup>

### **3. The provision of additional features does not change the classification as telecommunications carriers**

Some providers of functionally-equivalent VoIP may also provide some functions and features in addition to traditional telephone service.<sup>75</sup> The provision of such functions should not alter the proper statutory classification of such providers as telecommunications carriers. Those VoIP providers offering advanced functionality with their basic telephony service are offering "hybrid" services, which comprise elements of

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<sup>71</sup> 47 U.S.C. § 153(46).

<sup>72</sup> *Pulver Declaratory Ruling* at ¶ 20.

<sup>73</sup> *Pulver Declaratory Ruling* at ¶ 23 (citing *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995))

<sup>74</sup> *Pulver Declaratory Ruling* at ¶ 22.

<sup>75</sup> For instance, BellSouth is offering Centrex IP, a VoIP service that allows customers to use browser-based software to assist them with call management. As one of the features, customers can forward their communications to e-mail, voicemail or wireless phone based on the time of day and the individual's availability. Users log into a web site to alter their settings. Scott Sleet, *BellSouth VoIP Plans Surge Ahead*, Pike and Fischer VoIP Monitor Headlines, available at [http://www.voip-monitor.com/subscribers/index.htm?article\\_id=4913&PRINTV=Y](http://www.voip-monitor.com/subscribers/index.htm?article_id=4913&PRINTV=Y).

both an information and telecommunications service.<sup>76</sup> After *Computer I*, the Commission realized that “entities would offer ‘hybrid’ services combining both communications and data processing functions.”<sup>77</sup> The Commission noted that where message-switching was incidental to what was primarily a data processing service, the entire service would be unregulated. Conversely, if message-switching was part of a consumer’s communication service, the data processing element would be considered incidental to the message-switching service and the integrated service would be treated as telecommunications. The Commission concluded, “in making such determinations we would look to whether the service, by virtue of its message-switching capability, has the attributes of the point-to-point services offered by conventional communications common carriers and is basically a substitute therefore.”<sup>78</sup>

VoIP, by its nature, is a substitute for a conventional telephone since it enables users to have real-time voice communications that is functionally the same as any other telecommunications service. Thus, VoIP services should be classified as telecommunications since the data processing element is incidental to what is primarily a communications service.

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<sup>76</sup> *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, 77 FCC 2d 384, 390 (1980) (“*Second Computer Inquiry*”).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

**4. The *Brand X* decision supports classifying functionally-equivalent VoIP services as telecommunications services**

The *Notice* seeks comment on what effect that the court's decision *Brand X Internet Services v. FCC*<sup>79</sup> may have on the Commission's discretion to classify IP-enabled services.<sup>80</sup> In *Brand X*, the Ninth Circuit reversed and remanded the Commission's *Cable Modem Order*, in which the Commission concluded that high-speed access to the internet over cable system facilities was an information service rather than a telecommunications service.<sup>81</sup>

In the *Cable Modem Order*, the Commission reasoned that the statutory classification "turns on the nature of functions that the end user is offered." It found that "cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications."<sup>82</sup> While acknowledging that cable modem service involved the transmission of information that could constitute "telecommunications," the Commission drew a distinction between telecommunications and a "telecommunications service."<sup>83</sup> The Commission concluded that "we do not believe that the fact that cable modem service is provided over the cable operator's own facilities, *without more*, necessarily creates a telecommunications service separate and apart from the cable modem service."<sup>84</sup>

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<sup>79</sup> *Brand X Internet Services v. FCC*, 345 F.3d 1120, 1129 (9th Cir. 2003), *rehearing en banc denied to allow cert. review*, No. 02-70518, 2004 U.S. App. LEXIS 8023 (9th Cir. March 31, 2004) (quoting *AT&T v. Portland*, 216 F.3d 871, 877-78 (9th Cir. 2000)).

<sup>80</sup> *Notice* at ¶ 43.

<sup>81</sup> *Cable Modem Order*, 17 FCC Rcd at 4802, 4819.

<sup>82</sup> *Id.* at 4802, 4821. *See* 47 U.S.C. § 153(20).

<sup>83</sup> *Cable Modem Order*, 17 FCC Rcd at 4823.

<sup>84</sup> *Id.* at 4824 (emphasis added).

The Ninth Circuit reversed the Commission's determination that cable modem service was an information service and concluded that it was, at least, in part, a telecommunications service.<sup>85</sup> The *Brand X* court based its decision on the holding in a prior case, *AT&T v. Portland*, which held that "the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act"<sup>86</sup> Although the Ninth Circuit denied the petitions for rehearing en banc, it did grant a stay to permit parties to seek certiorari in the Supreme Court.

The *Brand X* decision supports the analysis in these comments. If a cable company's provision of cable model service includes a telecommunications service, then clearly, the provision of a functionally equivalent telephone service by means of cable modem service is also a telecommunications service.

However, even if the Supreme Court accepts certiorari, reverses the Ninth Circuit's decision, and upholds the FCC's *Cable Modem Decision*, the FCC would not be compelled to find that functionally equivalent VoIP services offered by cable operators are also information services. (This conclusion would also be valid if cable modem service were considered to be a cable service.) Unlike cable modem service, VoIP over cable allows the consumer to engage in voice communication that is the functional equivalent of traditional telephony. This service is not one, integrated information service like Internet access. It has two elements: first, it provides a transmission pipeline through which customers receive broadband access; second, it gives customers ability to

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<sup>85</sup> *Brand X Internet Services*, 345 F.3d at 1132.

<sup>86</sup> *Id.* at 1130, quoting *AT&T v. Portland*, 216 F.3d 871, 880 (9th Cir. 2000) In *Portland*, the court found that the dual role of the cable operator (as provider of both the transmission pipeline and the Internet access services) meant it was actually offering both

use the broadband access to send and receive voice transmissions just as if they were using traditional telephony. The VoIP service is the “more” that transforms cable modem service into telecommunications.<sup>87</sup> Because VoIP is a functionally different service from Internet access, the Commission should be able to classify it as a telecommunications service without conflicting with its finding in the *Cable Modem Order* that cable modem service is an information service.

**5. Nothing in the Wireline Broadband NPRM requires the FCC to classify functionally-equivalent VoIP services as information services**

A similar analysis applies to the FCC’s Wireline Broadband proceeding. The *Notice* seeks comment on how its “tentative conclusion” in the *Wireline Broadband NPRM* that DSL-based Internet access service is an information service relates to the statutory classifications in the instant proceeding.<sup>88</sup> In the *Wireline Broadband NPRM*, the Commission tentatively concluded that broadband Internet access is an information service since it “offer[s] more than a transparent transmission path to end-users and offer[s] enhanced capabilities.”<sup>89</sup> The Commission explains that providers of wireline broadband “provide subscribers with the ability to run a variety of applications” that fit under the information services rubric.<sup>90</sup> The Commission noted that Internet access has an element of telecommunications because it uses the existing telephone network (a basic

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telecommunications and information services, not one integrated information service. 216 F.3d at 877-78.

<sup>87</sup> *Cable Modem Order*, 17 FCC Rcd at 4824.

<sup>88</sup> *Notice* at ¶ 43.

<sup>89</sup> *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3030 (2002) (“*Wireline Broadband NPRM*”).

<sup>90</sup> *Id.*

service) to provide customers with enhanced services that are “more than a basic transmission offering.”<sup>91</sup>

USCCB, *et al.* note that this tentative view may never be adopted. Indeed, if the Brand X decision stands, it is difficult to imagine how the FCC could adopt this view. But even assuming the Commission ultimately adopts its tentative conclusion in the Wireline Broadband proceeding, that decision would not prevent it from classifying functionally equivalent VoIP as a telecommunications service.

The *Wireline Broadband NPRM* focused on basic Internet functions where, for instance, interactivity is necessary to download files from or navigate and use web sites.<sup>92</sup> While this interactivity with information and web sites does indeed change the form and content of the information, VoIP is very different. Providers of wireline VoIP services, by definition, are offering a core service that transmits voice communication as seamlessly as possible between end-users. Thus, regardless of the outcome of the Wireline Broadband NPRM, the Commission should classify functionally equivalent VoIP services offered by wireline carriers as telecommunications services.

## **6. Classification as telecommunications carriers does not require the Commission to regulate all aspects of VoIP service**

The classification of functionally equivalent VoIP services offered by telephone and cable companies over their transmission facilities does not necessarily require the Commission regulate all aspects of those services. As the *Notice* correctly notes, the Commission is empowered by statute to use its forbearance authority if the statutory

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<sup>91</sup> *Id.* at 3027.

<sup>92</sup> *Id.* at 3031.



classification accorded to VoIP services leads to regulatory consequences that are neither necessary nor appropriate.<sup>93</sup>

Under section 160, the Commission is required to forbear from applying a particular regulation or statutory provision if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.<sup>94</sup> The *Notice* seeks comment on whether it should use its forbearance authority to modify the default Title II regulatory framework.<sup>95</sup>

Applying this standard, it is clear that the Commission may not forbear from requiring telecommunications carriers to contribute to the USF. As shown in Part I, *supra*, mandatory, equitable contributions from telecommunications carriers providing functionally equivalent VoIP to the USF are necessary to protect consumers, especially low-income and rural consumers who depend on subsidies from the USF. However, such contributions benefit all consumers by ensuring that competition can develop and be sustained on a level playing field. Moreover, it would not be in the public interest to allow VoIP telecommunications carriers to forbear from contributing to the USF. The benefits of maintaining a viable universal service system outweigh any argument that VoIP providers should not contribute equally to the USF.

While forbearance from universal obligations would not be appropriate, the Commission could find that other types of regulation are not necessary to ensure just and

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<sup>93</sup> *Notice* at ¶ 47.

<sup>94</sup> 47 U.S.C. § 160(a).

<sup>95</sup> *Notice* at ¶ 49.

reasonable rates, protect consumers, or serve the public interest. USCCB, *et al.* take no position on which other regulations might be appropriate candidates for forbearance. We do note, however, that the fear of “unnecessary” regulation is not a reasonable basis for rejecting the telecommunications service classification.

**B. The Commission Should Use Its Ancillary Jurisdiction to Require All Providers of Functionally-Equivalent VoIP Services that are Not Telecommunications Carriers to Provide Equitable Support for the USF**

It is likely that the Commission will find that some providers of functionally equivalent VoIP services do not fall within the definition of a telecommunications carrier. This category includes VoIP service providers that do not provide transmission service or transmission capacity to the user; that is, the user must have an existing broadband Internet access service to use the service.<sup>96</sup> It might also include VoIP providers that provide transmission capacity, but that the FCC nonetheless finds do not meet the statutory definition of a “telecommunications service.” For these VoIP providers, the

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<sup>96</sup> Vonage may be one example of such a service. Vonage’s service has all of the characteristics described in Part II, that makes its service functionally equivalent to traditional telephones. Vonage customers engage in instantaneous, real-time communication, are assigned a traditional telephone number, and their calls connect with the PSTN when calls are placed to non-VoIP users. Vonage offers its service to the general public and charge fees to their customers. Vonage accepts both residential and small business customers and offers several different types of plans and rates. Accordingly, despite the lack of transmission capacity, customers of VoIP services such as Vonage have the functional equivalent of a traditional telephone. Indeed, the State of New York Public Service Commission recently determined that Vonage is a “telephone corporation” as defined by New York state law based on its ability to “complete telephone-like calls.” State of New York Public Service Commission Press Release #04038, *PSC: Vonage is a Telephone Corporation as Defined by NYS Law*, May 19, 2004, available at [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/ArticlesByCategory/06086843A52CFBF085256E990060FC3B/\\$File/pr04038.pdf?OpenElement](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/ArticlesByCategory/06086843A52CFBF085256E990060FC3B/$File/pr04038.pdf?OpenElement).

Commission should ensure equitable contributions to the USF by exercising its ancillary jurisdiction.

It is well-established that the FCC can assert ancillary jurisdiction under section 2(a) of the Communications Act of 1934<sup>97</sup> “over activities that are not within the reach of Title II.”<sup>98</sup> The FCC has asserted ancillary jurisdiction to regulate information services in the past,<sup>99</sup> and the courts have repeatedly upheld this power.<sup>100</sup> To assert this jurisdiction, the Commission must show that the information services it seeks to regulate—in this case, functionally equivalent VoIP services—meet the two part test established by the Supreme Court.<sup>101</sup>

As a threshold matter, the test requires the Commission to demonstrate that the information services it seeks to regulate are covered by section 2 of the Communications Act.<sup>102</sup> The second part of the test requires the Commission to show that regulation of the information service is necessary to ensure the effective performance of the Commission’s various responsibilities.<sup>103</sup> In the case of functionally equivalent VoIP services, the Commission can meet both prongs of this test.

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<sup>97</sup> 47 U.S.C. § 152(a).

<sup>98</sup> *Computer & Communications Ind. Ass’n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-173 (1968)).

<sup>99</sup> *See Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premise Equipment by Persons with Disabilities*, 16 FCC Rcd 6417 (1999) (“Section 255 Report and Order and FNOR”).

<sup>100</sup> *See, e.g., United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Computer & Communications Ind. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

<sup>101</sup> *Midwest Video Corp.*, 406 U.S. at 659-662; *Southwestern Cable Co.*, 392 U.S. at 171-173.

<sup>102</sup> 47 U.S.C. § 152(a).

<sup>103</sup> *See Midwest Video Corp.*, 406 U.S. at 661-662 (stating that the FCC reasonably concluded that regulation was imperative if the Commission was to perform with

**1. Functionally equivalent VoIP services are covered by Section 2**

Under the first part of the test established by the Supreme Court, the Commission must show that the functionally equivalent VoIP services fall within the coverage of section 2(a). Section 2(a) confers regulatory authority over “all interstate and foreign communication by wire or radio.”<sup>104</sup> Functionally equivalent VoIP services are interstate communications by wire or radio and therefore fall under the Commission’s Title I jurisdiction.

First, VoIP is “interstate.” The FCC has already held that Pulver’s FWD service is an interstate service.<sup>105</sup> The rationale applied by the Commission in that decision applies with equal force to other VoIP services and should therefore be extended to include all functionally equivalent VoIP services.

Second, VoIP is a “communication by wire or radio.” Section 3 of the Communications Act defines communication by wire and communication by radio to include the transmission of “writing, signals, pictures and sounds of all kinds . . . including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.”<sup>106</sup> VoIP is a service that transmits sounds and other information and it does so means of by wire—such as a cable or DSL internet service—or by radio—such as transmission via satellite.

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appropriate effectiveness certain of its other responsibilities); *Southwestern Cable Co.*, 392 U.S. at 173-174 (holding that the authority to exercise ancillary jurisdiction is restricted to “that reasonably ancillary to the effective performance of the Commission’s various responsibilities”); *see also Computer & Communications Ind. Ass’n*, 693 F.2d at 213.

<sup>104</sup> 47 U.S.C. § 152(a) (2004); *see Southwestern Cable Co.*, 392 U.S. at 173.

<sup>105</sup> *Pulver Declaratory Ruling* at ¶¶ 20-24.

The fact that some VoIP services may be considered “information” or “enhanced” services does not preclude the exercise of ancillary jurisdiction. In the *Computer II Final Decision*, the Commission found that the enhanced services under consideration<sup>107</sup>—combined data processing and communications services and customer premises equipment—“constitute[d] the electronic transmission or writing, signals, pictures, etc. over the interstate telecommunications network and, as such, [fell] within the subject matter jurisdiction of the Commission.”<sup>108</sup> More recently, the Commission asserted ancillary jurisdiction to regulate two other information services—voice mail and interactive menu services—that met the requirements of section 2(a).<sup>109</sup> The Commission held that these services were “at the very least ‘incidental’ to the ‘receipt, forwarding and delivery of communications.’”<sup>110</sup>

Similarly, VoIP services fall within this definition. Functionally equivalent VoIP services do involve the transmission of signals and sounds as well as the receipt, forwarding and delivery of communications. VoIP services are more than “incidental” to the receipt, forwarding and delivery of communications. The VoIP provider’s service enables consumers to engage in real-time conversations. Without such services, consumers would not be able to use their Internet connections for voice conversations.

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<sup>106</sup> 47 U.S.C. §§ 153(31), (51).

<sup>107</sup> Enhanced services are now referred to as information services.

<sup>108</sup> *Second Computer Inquiry*, 77 FCC 2d at 432.

<sup>109</sup> *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premise Equipment by Persons with Disabilities*, 16 FCC Rcd 6417, 6457 (1999) (“*Section 255 Report and Order and FNOF*”).

<sup>110</sup> *Id.*

Because functionally equivalent VoIP services are interstate communications by wire or radio, these services fall within the coverage of section 2(a).

**2. Assertion of ancillary jurisdiction over functionally-equivalent VoIP services is necessary for the Commission's effective performance of its statutory responsibilities**

The second part of the test used by the courts to determine whether the Commission can exercise ancillary jurisdiction requires the Commission to show that regulation of the information service is necessary to ensure the effective performance of the Commission's various responsibilities.<sup>111</sup> This prong addresses the question of whether the assertion of jurisdiction over information services pursuant to Title I is reasonably ancillary to the performance of the FCC's statutory responsibilities.<sup>112</sup>

Assertion of jurisdiction over functionally equivalent VoIP services is necessary to ensure the effective performance of the Commission's responsibilities under section 254. As the Commission found in its Order Implementing Section 254, a "principle purpose of section 254 is to create mechanisms that will sustain universal service *as competition emerges*."<sup>113</sup>

If the Commission does not require equitable contributions from all functionally equivalent VoIP service providers, the continued vitality of the Universal Service Fund

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<sup>111</sup> See *Midwest Video Corp.*, 406 U.S. at 661-662 (stating that the FCC reasonably concluded that regulation was imperative if the Commission was to perform with appropriate effectiveness certain of its other responsibilities); *Southwestern Cable Co.*, 392 U.S. at 173-174 (holding that the authority to exercise ancillary jurisdiction is restricted to "that reasonably ancillary to the effective performance of the Commission's various responsibilities"); see also *Computer & Communications Ind. Ass'n*, 693 F.2d at 213.

<sup>112</sup> Notice at ¶ 49.

<sup>113</sup> 1997 Universal Service Order, 12 FCC Rcd at 8803 (emphasis added).

will be jeopardized. The Commission found that it could exercise ancillary jurisdiction over voicemail and interactive menu services because those services, if left unregulated, “would defeat the effective implementation of sections 255 and 251(a)(2).”<sup>114</sup> The Commission found that “the underlying telecommunications services that sections 255 and 251(a)(2) have sought to make available will not be accessible to persons with disabilities in a meaningful way” if voicemail and interactive menu services were not regulated.<sup>115</sup> Similarly, as shown in Part I *supra*, a failure to require contributions to the Universal Service Fund by functionally equivalent VoIP services would defeat the effective implementation of section 254’s duty to provide reasonable access and reasonable rates to telecommunications services to all people.

Moreover, failure to require equitable contributions would give unfair competitive advantages to certain providers contrary to principles of competitive neutrality. Competitive neutrality means that universal service rules cannot “unfairly advantage or disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.”<sup>116</sup> The Commission explained that “technological neutrality,” was necessary to “avoid limiting providers of universal service to modes of delivering service that are obsolete or not cost effective.”<sup>117</sup> The principle of competitive neutrality thus requires the Commission to apply section 254’s contribution provisions to functionally equivalent VoIP services since they can replace traditional telephone services.

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<sup>114</sup> *Section 255 Report and Order and FNOI*, 16 FCC Rcd at 5657-58.

<sup>115</sup> *Id.*

<sup>116</sup> *1997 Universal Service Order*, 12 FCC Rcd at 8801.

<sup>117</sup> *Id.* at 8802.

**3. The Commission's Order in *Pulver* does not preclude the exercise of ancillary jurisdiction over providers of functionally equivalent VoIP services**

The *Notice* seeks comment on the implications of the Commission's finding that *Pulver*'s FWD offering is an unregulated information service.<sup>118</sup> The *Pulver* decision does not limit the FCC's ability to exercise ancillary jurisdiction over VoIP services that while classified as information services, provide service functionally equivalent to traditional telephone service. *Pulver*'s FWD service is easily distinguishable from the types of services discussed in these comments because it is not functionally equivalent to traditional telephone service. Specifically, FWD does not allow users to communicate with users of the PSTN or even other VoIP services, nor does it use regular telephone numbers. Instead, FWD user can communicate only with other FWD members using *Pulver*-assigned five or six-digit numbers.<sup>119</sup> Moreover, this service is offered for free.<sup>120</sup>

In sum, the FCC can and should exercise its ancillary jurisdiction to require all VoIP services that provide service functionally equivalent to traditional telephone service to make equitable contributions to the universal service fund.

**C. The Advent of IP-Enabled Services Favors Adoption of All Revenue Universal Service Reform**

The Commission asks whether the advent of IP-enabled services weigh in favor of any specific USF methodology reforms.<sup>121</sup> As VoIP becomes more prevalent, the Commission should take steps to insure that the USF remains viable by adopting a

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<sup>118</sup> *Notice* at ¶ 35.

<sup>119</sup> *Pulver Declaratory Ruling* at ¶ 5.

<sup>120</sup> *Id.* at ¶ 10.

<sup>121</sup> *Notice* at ¶ 64.



methodology that takes into account the blurring of interstate and intrastate telecommunication services by assessing all telecommunications revenue.

As noted in the *Pulver Order*, VoIP services defy traditional interstate-intrastate analysis. Traditionally the FCC has used an “end-to-end” inquiry that examines the location of where calls originate and terminate to determine whether a service is interstate or intrastate.<sup>122</sup> This paradigm has little relevance in relation to VoIP services that travel over the Internet and where members’ locations are not relevant to the service provided or, for that matter, even determinable.<sup>123</sup>

In reply comments filed in the *Universal Service Contribution Methodology* proceeding, many of the same parties joining these comments argued that the Commission has the authority to adopt an all-revenue assessment system in response to the impossibility of distinguishing between intrastate and interstate telecommunication services.<sup>124</sup> As VoIP services are deployed at an increasingly rapid rate and supplement circuit-switched network communications, the argument for an all-revenue USF contribution methodology becomes even more compelling.

Although section 2(b) of the 1934 Communications Act generally denies the Commission authority over “charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service by wire or

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<sup>122</sup> *Pulver Declaratory Ruling* at ¶ 21.

<sup>123</sup> *Id.*

<sup>124</sup> Reply Comments of Consumers Union, Texas Office of Public Utility Counsel, Consumer Federation of America, Appalachian People’s Action Coalition, Center for Digital Democracy, Edgemont Neighborhood Coalition, and Migrant Legal Action Program (filed April 18, 2003), in response to *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24,952 (2002) (“*USF Contribution Methodology NPRM*”).

radio,”<sup>125</sup> the courts have recognized the FCC’s authority over intrastate matters when it is impossible or impractical to separate the intrastate and interstate components.<sup>126</sup> This language reflects a time when interstate and intrastate telecommunication services were readily distinguishable;<sup>127</sup> since that time, the line between intra and interstate services has blurred considerably. Indeed, since comments were filed more than a year ago in the *USF Contribution Methodology NPRM* proceeding, the telecommunications landscape has experienced a shift toward new VoIP technology that is pushing the industry towards a regime where intrastate communications will be either nonexistent or irrelevant.<sup>128</sup>

The *Pulver* decision found that it was “impossible or impractical to attempt to separate [Pulver’s service] into interstate and intrastate components” and declared that it had federal jurisdiction over the service.<sup>129</sup> Other VoIP services are subject to the same inherent characteristics that make intrastate and interstate distinctions indistinguishable.

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<sup>125</sup> 47 U.S.C. § 152(b) (emphasis added).

<sup>126</sup> Reply Comments of CU *et al.*, *USF Contribution Methodology NPRM* at 11-13 (Filed April 18, 2003).

<sup>127</sup> See *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 360 (1986) (noting that the Act sought to “divide the world of domestic telephone service neatly into two hemispheres—one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the states would retain exclusive jurisdiction”).

<sup>128</sup> VoIP is rapidly being deployed with 2004 seeing “the first substantial national deployment of both business and residential VoIP solutions. Virtually every segment of the telecommunications industry has now announced plans for the aggressive deployment of VoIP-based solutions.” *VoIP at the Crossroads* at 2. Several major telecommunications and cable companies have recently introduced business and residential VoIP services, including AT&T, BellSouth, Qwest, Verizon, Cox, Time Warner and Cablevision, to name a few. See, e.g., Alan Breznick, *Cable MSOs Pick up VoIP Pace, Shrug Off Vonage*, Communications Daily, May 25, 2004; Ellen Sheng of Dow Jones Newswires, *Cable-Baby Bell Competition Heats Up in Business Services*, Wall St. J. Online, March 30, 2004; Bobby White, *AT&T to Begin Offering Voice Over Internet Protocol Service in Texas*, Fort-Worth Star Telegram, March 31, 2004; Qwest, *Qwest Communications is First Major Telecom Company to Provide Voice Over Internet Protocol Service to Customers*, Dec. 10, 2003.

We noted in our reply comments that when a substantial portion of telecommunication revenue is derived from services where it is impossible to distinguish between interstate and intrastate revenue, it would be appropriate for the Commission to assess carriers' USF contributions on the basis of their total revenues. It appears that this point is rapidly approaching as most telecommunications carriers migrate towards Internet-based telecommunications. The FCC, therefore, can successfully assert jurisdiction over all telecommunications revenue under the "impossibility exception" doctrine.<sup>130</sup>

As we argued previously, an all-revenue plan would resolve the intractable problem of determining whether income is derived from intrastate or interstate sources. Not only is this good policy, it better accomplishes Congress's goal of ensuring a "specific, predictable and sufficient" mechanism for advancing universal service.<sup>131</sup>

Furthermore, an all-revenue system ensures that quality service is available at just, reasonable, and affordable rates. By keeping a revenue-based system, the inequities of a connections-based approach are avoided. An all-revenue approach would also be much simpler to administer than the current interstate methodology and would distribute the USF burden over a broader base of revenue, keeping consumer contributions down.

## CONCLUSION

For the foregoing reasons, USCCB, *et al.* strongly urge the Commission to require VoIP services that provide the functional equivalent of telephone service to support universal service.

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<sup>129</sup> *Pulver Declaratory Ruling* at ¶ 22.

<sup>130</sup> This exception was first recognized in *North Carolina Util. Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976).

Respectfully submitted,

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<sup>131</sup> 47 U.S.C. § 254(b)(5).